



Ethics: Let's Talk About It

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I know what you're thinking...



And I'm thinking...



And then I thought...



LET'S DO THIS TOGETHER!!

Where does this ethical authority/obligation come from?

- ◇ *In re Gault* 387 U.S. 1 (1967)
 - ◇ Case that established procedural due process safeguards under Fourteenth Amendment for juvenile defendants
 - ◇ SCOTUS gave guidance such as:
 - ◇ PO cannot act as counsel for child; neither can the Judge.
 - ◇ Any child facing “the awesome prospect of incarceration” needs the “guiding hand of counsel at every step of the proceedings against him...for the same reasons that adults facing criminal charges need counsel.”
 - ◇ Defenders are required to make skilled inquiries into the facts of the allegations, and to ascertain whether youthful client has a defense—and to prepare and submit it.
 - ◇ It is the defender’s job to protect the child’s constitutional rights.

Where does this ethical authority/obligation come from?

- ◇ Miss. Code Ann. § 43-21-201—Right to counsel
 - ◇ Child's attorney shall owe the same duties of undivided loyalty, confidentiality and competent representation to the child or minor as is due an adult client pursuant to MRPC.
- ◇ Case law
 - ◇ Failure to inform of sentencing options was deemed ineffective assistance of counsel. To be considered effective, counsel has a duty to make at least a minimum investigation of the law, especially on such an important issue as sentencing mitigation for a minor. *Burley v. Cabana*, 818 F.2d 414, 417 (5th Cir. 1987)

Common Ethical Rules in Youth Court Practice

- ◆ MRPC 2.1 Advisor
- ◆ MRPC 1.1 Competence
- ◆ MRPC 1.4 Communication
- ◆ MRPC 1.3 Diligence
- ◆ MRPC 1.2 Scope of Representation
- ◆ MRPC 1.14 Client Under a Disability
- ◆ MRPC 1.6 Confidentiality

MRPC 2.1 Advisor

- ◆ In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

MRPC 2.1

- ◇ What this really means for us:
 - ◇ Be well versed in the facts of the case.
 - ◇ Be well versed of all disposition options in your jurisdiction.
 - ◇ Make sure client is well versed in how facts interplay with options.

MRPC 1.4 Communication

- ◊ (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- ◊ (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MRPC 1.4

- ◆ What this really means for us:
 - ◆ Maintain an open means of communication with your client
 - ◆ Preview and review court proceedings
 - ◆ Keep client informed
 - ◆ Use age-appropriate language
 - ◆ Earn client's trust
 - ◆ When client is detained, means of communication should be more (not less) diligent

MRPC 1.2 Scope of Representation

- ◇ Mississippi Rules of Professional Conduct 1.2 Scope of Representation
- ◇ MRPC 1.2 (a): A lawyer *shall* abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and *shall* consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer *shall* abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

MRPC 1.2

- ◇ Mississippi Rules of Professional Conduct 1.2 Scope of Representation
- ◇ MRPC 1.2 (c): A lawyer may limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- ◇ (d): conduct lawyer knows to be criminal; (e): lawyer shall advise client regarding relevant limitations if client expects assistance not permitted by Rules.

MRPC 1.2

- ◇ What this really mean for us:
 - ◇ Defense counsel must advocate for client's expressed interests.
 - ◇ Not “best interest”, not parents or guardian's interest, not PO, prosecutor or judge's interest.
 - ◇ Decisions concerning case strategy and tactics, theories and themes, witnesses to call and motions to file are left to counsel.
 - ◇ These decisions, however, should not conflict with client's expressed interests.
 - ◇ The best way to empower our clients is to give them as much information as possible so they can make informed decisions.

MRPC 1.6 Confidentiality

- ◆ (a) A lawyer shall not reveal information relating to the representation of a client **unless the client gives informed consent**, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- ◆ (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client. (6) to comply with other law or a court order

MRPC 1.6

- ◆ What this really mean for us:
 - ◆ There is NO exception for parents or guardians.
 - ◆ Interviews must take place outside of the presence of parents or guardians; neither do parents or guardians have a right to inspect defense counsel's files, notes, discovery, etc WITHOUT client's expressed consent.
 - ◆ There is NO exception for what we may think may be for clients' best interests.
 - ◆ It is best to educate clients as best as possible so that together, your and client's interests align.
 - ◆ Confidentiality continues even after representation ceases.

MRPC 1.1 Competence

MRPC 1.3 Diligence

- ◆ 1.1—A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ◆ 1.3—A lawyer shall act with reasonable diligence and promptness in representing a client.

MRPC 1.1 and 1.3

- ◆ What this really means for us:
 - ◆ Together, these rules encompass the obligations of defenders to investigate, zealously protect the youth's due process rights, to engage in dispositional advocacy, and to seek access to ancillary services.
 - ◆ Utilize experts! We're entitled to them.
 - ◆ Seek national opportunities as well. The Gault Center (formerly the National Juvenile Defender Center) has tons of resources on their site (njdc.info); information on various juvenile (youth) related training, including a summer immersion training (JTIP Summer Academy).

1.14 Client Under a Disability

- ◇ (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. (c) Information relating to the representation of a client who may be impaired is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

MRPC 1.14

- ◇ What this really means for us:
 - ◇ Simply because our clients are youthful (“minority”), does not mean that we can automatically act in their “best interests.”
 - ◇ If you truly feel as if they are incapacitated, request a guardian.
 - ◇ Confidentiality still holds unless necessary to protect client’s interests.

HYPO #1

- ◆ Client AB (15) is charged with house burglary. It is her third case. AB wishes to be certified as an adult. The client, along with her mother, are tired of dealing with the antics in youth court and desire the option of having a trial by jury. At worst, they feel, AB can receive nonadjudicated probation. You have attempted to meet with the child without the mother, but the client wishes her mother to be a part of all discussions. You know the steep consequences of transfer, so you are against client's wishes to be certified as an adult. What do you do?

HYPO #1

- ◇ Similar to Buck v. State, 838 So.2d 256
 - ◇ 16-year-old in Warren County that requested she be certified as an adult. She'd been to training school before.
 - ◇ MS statute does not contemplate a juvenile's transfer request. 2.1 (Advisor and 1.4 Communication)
 - ◇ Defender advised her to not seek certification. Should also advise that he (lawyer) is not able to move, but only court and prosecution can move.
 - ◇ Ultimately, Miss. found no ineffective assistance.

HYPO #2

- ◇ Child XM (16) is charged with an offense in Youth Court. While the matter is pending, one of XM's friends makes a TikTok with XM, where XM and friend are discussing having been charged with crimes. XM mentions how unfair the judicial system is and can be because he is a victim of it.
- ◇ What, if anything, do you do?

HYPO #2

- ◆ MRCP 2.1 Advisor—discuss how this video may be captured and used against them
- ◆ Should you advise the client to remove the content?
 - ◆ Content remaining may break the confidentiality of the Youth Court rules.
 - ◆ Philadelphia Bar Association Professional Guidance Committee concluded that while a lawyer may advise a client to change the privacy settings on the client's Facebook page, a lawyer “may not instruct or permit the client to delete/destroy a relevant photo, link, text, or other content, so that it no longer exists.” This has now been adopted there.
 - ◆ Meanwhile, NY Rules of Professional Conduct (New York County Lawyers Association Ethics Opinion 745, 2013) don't preclude advising client to remove content, “as long as the lawyer and client are not bound by a duty to preserve the material under substantive law.”
 - ◆ Even if advise to change privacy settings or even delete conduct, it may be generally unethical to store.

HYPO #3

◆ John is a 15 year old child with an IQ of 68 and diagnosed with attention deficit hyperactivity disorder. He is charged with assault with brass knuckles in a school fight/riot. If the child pleads, the case will remain in juvenile court. If he wants a trial, the prosecutor will seek a transfer hearing and try John as an adult. In your professional judgment, John should accept the plea. When you give John your advice, he tells you that he's not admitting to anything and that he wants a jury trial. What are your ethical obligations?

HYPOTHESIS #3

- ◆ MRCP 2.1—Role of advisor. Make sure to adequately explain both systems. Children (and their families) think they know all about both, but mostly likely do not.
- ◆ MRCP 1.14—Diminished capacity. Would the minority provisions apply here?
- ◆ MRCP 1.6—Confidentiality. Would involving parents help? What if client doesn't want parents involved—doesn't consent?
- ◆ MRCP 1.4—Communication

HYPO #4

- ◆ You have represented client PJ on several occasions in youth court. In prior representations, the family has retained you to represent PJ.
- ◆ On this last arrest, shoplifting from Dollar General, PJ has advised that he does not want you to be his attorney. This is after his family has retained you.
- ◆ At the last court hearing, PJ tells the Court that he does not want you representing him. The court is reluctant to appoint counsel because the family can afford counsel, and has already done so. Additionally, the Court is more comfortable with you representing PJ. What do you do?

HYPOTHESIS #4

- ◆ MRPC—1.2—Scope of Representation
 - ◆ Client's expressed interest shall be advocated for.
- ◆ MRPC—1.6—Confidentiality
 - ◆ Cannot air any confidential information—even to family—as they make their decision what to do.
- ◆ MRPC—1.16(d), requires the withdrawing lawyer to take reasonable steps to protect the client's interests, including delivering all papers and property to which the client is entitled.

Any questions?



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